(12)

No. 93-1121

IN THE

Supreme Court of the United States

October Term, 1994

ED PLAUT, *et al.*,

Petitioners,

v.

SPENDTHRIFT FARM, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The Washington Legal Foundation hereby moves, pursuant to this Court's Rule 37.4, for leave to file the attached brief *amicus curiae* in support of the respondents. Counsel for respondents and the United States have consented to the filing of this brief; counsel for petitioners Ed Plaut, *et al.*, have refused to provide consent, thereby necessitating the filing of this motion.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C., with over 100,000 members and supporters nationwide. WLF devotes substantial resources to litigating cases that raise issues of federalism, separation of powers, statutory interpretation, and other constitutional issues. WLF

has appeared before this Court as amicus in numerous cases raising these issues. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018 (1994); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994); *Davis v. United States*, 114 S. Ct. 2350 (1994).

This case raises important due process, separation of powers, retroactivity, and statutory interpretation questions, the resolution of which will have a greater impact on the public interest than the particular case before the Court. On the one hand, Section 27A of the Securities and Exchange Act of 1934 is addressed only to a discrete set of individuals and is intended to apply only retroactively; as such, Section 27A is a narrow antithesis of a prospective law of general applicability. On the other hand, the fundamental questions posed by this case are not limited to a discrete and transient set of claims arising under the Securities Exchange Act. To the contrary, this case presents a clear opportunity for the Court to address a vital and recurrent constitutional issue, and to provide federal lawmakers with much needed guidance.

WLF brings a broader perspective to these issues and has presented arguments in its brief that complement rather than duplicate those of the respondents. For the foregoing reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the respondents.

Respectfully submitted,

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The interest of *amicus* Washington Legal Foundation is set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts the Statement of the Case in respondents' brief.

SUMMARY OF ARGUMENT

Respondents argue that 476 of the FDIC Improvement Act of 1991, codified as Section 27A of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa-1 ("Section 27A"),[1] violates the Separation-of-Powers doctrine and the Due Process Clause of the Fifth Amendment. *Amicus* agrees generally with these arguments, but would argue further that Section 27A violates the core constitutional principle of the Rule of Law as well as at least one additional textual constraint on Congress' legislative powers, namely the *Ex Post Facto* clause in Article I, Section 9,

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[1] Section 27A, in its entirety, provides as follows:

> (a) Effect on Pending Causes of Action. -- The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on Dismissed Causes of Action. -- Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 -- (1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. § 78aa-1).

Clause 3. Moreover and related to these arguments, *amicus* urges the Court to address squarely petitioner's argument that Section 27A should be read literally to avoid the various constitutional issues.

As this Court well knows, Congress continues to revisit judicial decisions -- including both statutory and constitutional decisions of this Court.[2] Each time Congress overturns a judicial decision and provides a remedy beyond that authorized by the Judiciary, the same quandary posed by Section 27A arises; that is, how to deal with individual litigants whose rights have been adjudicated or otherwise resolved during the period between the judicial decision and any congressional reaction thereto.

By directing that courts grant specifically identifiable private litigants relief from any "unfair" results of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) ("*Lampf*") and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) ("*Beam*"),[3] Section 27A contravenes not only the Separation-of-Powers doctrine and due process, as respondents argue, but also the jurisprudential premise upon which all other judicial functions rest: the Rule of Law. *Amicus* would argue further that it was to protect against just

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[2] One recent study shows that between 1967 and 1990, Congress has overturned no less than 121 different Supreme Court statutory decisions and an additional 220 lower court rulings. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L. J. 331, 424, App. I (1991).

[3] Before Section 27A, the rule announced in *Lampf* had been applied consistently in the lower courts, resulting in the dismissal of a number of highly publicized private securities fraud cases, including those against Michael Milken and Charles Keating. Many Members of Congress apparently thought the application of *Lampf* to plaintiffs in these cases was unfair. *See, e.g.*, 137 Cong. Rec. S17,315 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle) ("We must take steps to protect those investors who had cases pending prior to that decision"); 137 Cong. Rec. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey) ("shockingly, over $4 billion of fraud claims, including those against Milken, Keating and Fred Carr, are threatened with pending dismissal motions solely as a result of Lampf, and that decision's retroactive application").

such legislative encroachments that the text of the Constitution explicitly prohibits Congress from passing laws *ex post facto*.[4]

To be sure, Congress has the power to "overturn" the Court's statutory rulings by establishing new prospective laws. If Congress disagrees with *Lampf*, for instance, Congress is free to amend the statute (assuming, of course, the amended statute remains within Congress' legislative powers under Article I). Unless and until *Lampf* is overturned, however, Congress does not have the power to instruct the Court to disregard its own ruling, to instruct the lower courts to ignore otherwise determinative rulings of the Court, or to adopt a judicial methodology — in this case borrowing of state statutes of limitations — explicitly rejected by the Court, based upon the Court's definitive interpretation of the intent of the 1934 Congress. These Article III judicial matters are beyond congressional authority under Article I.

Finally, as demonstrated below, Section 27A can and should be read as merely a codification -- not a "reversal" -- of the Court's holdings in *Lampf* and *Beam*. "The laws," as that term is used in Section 27A, can only refer to Congressional enactments, *i.e.* Sections 10(b) and 9(e) of the Securities Exchange Act of 1934, not to varying *misinterpretations* of the 1934 Act by lower federal courts. A literal reading of Section 27A not only avoids difficult constitutional issues but also accords with traditional notions of the relative roles of the federal Judiciary and Legislature, thereby advancing the principle of judicial restraint.

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[4] Section 27A neither alters the 1934 Act's one-year/three-year statute of limitations nor overturns *Lampf*, but "allow[s] the *Lampf* decision to be set aside so there would, in fact, be a legal reachback to cover cases" pending at the time that *Lampf* was decided. 137 Cong. Rec. S17,306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle); *see Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 113 S. Ct. 2085, 2089 (1993) ("*Musick*") ("Congress did no more than direct the applicable 'limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*].' 15 U.S.C. § 78aa-1 (Supp. III).").

ARGUMENT

I. THE CONSTITUTION PROHIBITS RETROACTIVE FEDERAL LEGISLATION PURPORTING TO CHANGE "THE LAW" APPLICABLE TO PENDING OR ALREADY DISMISSED ARTICLE III CASES BETWEEN OR AMONG PRIVATE PARTIES

Article III of the Constitution grants to the courts alone the power to decide "cases" and "controversies," and thus precludes legislative direction to reach specific results in designated cases. Section 27A is the type of purely retroactive law that is repugnant to the United States Constitution. In *Marbury v. Madison*, Chief Justice John Marshall stressed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1 Cranch) 137, 163 (1803). *Amicus* respectfully suggests that Section 27A, if permitted to stand, would eviscerate not only the reliance individual parties in litigation had placed on this Court's exposition of "the law" in *Lampf*, but also the reliance that all future litigants are rightly entitled to place in any other decisions of this Court.

When addressing challenges to retroactive civil legislation, modern American courts typically resort to a "minimum scrutiny" due process balancing test: "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . ." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *see United States v. Carlton*, 114 S. Ct. 2018, 2022 (1994) (following, *inter alia*, *Pension Benefit Guaranty*). This essentially subjective test provides little guidance as to the outer bounds of Congress' constitutional power to pass retroactive laws affecting private parties in litigation.

Such a test is especially inappropriate when Congress has intruded on a core power of the Judiciary: retroactively affecting the outcomes of Article III cases between or among private parties. At the time of the drafting and ratification of the Constitution, *legal* necessity — as opposed to political expedience — was the only excuse for an exception to the

general rule against retroactive (*i.e.*, *ex post facto*) legislation, whether nominally civil or criminal.[5]

If Congress can retroactively unsettle the effects of *Lampf* and *Beam* vis-à-vis some but not all private parties in pending or already dismissed judicial cases, then Congress can retroactively unsettle the effects of any other decision of the Court -- based merely upon results with which a majority of Members of Congress disapprove.

Although the Sixth Circuit based its decision on the Separation-of-Powers doctrine, relying on *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792),[6] that holding necessarily implicates other textual and structural provisions of the Constitution dealing with retroactivity, foremost of which is the federal *Ex Post*

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[5] During the constitutional debate, James (later Justice) Iredell made the following observations about retroactive laws being tolerable only in cases of "invincible necessity":

> *Ex post facto* laws may sometimes be convenient, but that they are ever absolutely necessary I shall take the liberty to doubt, till that necessity can be made apparent. Sure I am, they have been the instrument of some of the grossest acts of tyranny that were ever exercised, and have this never failing consequence, to put the minority in the power of a passionate and unprincipled majority, as to the most sacred things, and the plea of necessity is never wanting where it can be of any avail.

Iredell, *Observations on George Mason's Objections to the Federal Constitution*, in *Pamphlets on the Constitution of the United States: Published During Its Discussion by the People 1787-1788* 333, 368 (P. Ford ed. 1888). Neither the petitioner nor the Solicitor General has pled necessity as a justification for Section 27A -- because there was no "invincible necessity" for the purely legislative suspension of *Lampf* and *Beam*.

[6] *See generally Gordon v. United States*, 117 U.S. 697, 703 (Appendix 1885) (the principle that the Court's judgments cannot be subject to revision by Congress "was decided by this Court as long ago as 1792, in *Hayburn's Case*, 2 Dall. 409, and this decision has even since been regarded as a constitutional law"); *Hurtado v. California*, 110 U.S. 516, 536 (1884) ("due process of law" categorically excludes from legislative power, *inter alia*, "acts reversing judgments, . . . legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation").

Facto clause.[7] *Amicus* urges the Court to address the federal *Ex Post Facto* clause not only on its own merits, but for insight into both the Separation-of-Powers doctrine upon which the Sixth Circuit's decision rests, and respondents' Due Process argument.

A. Unlike the State Legislative Power at Issue in *Calder v. Bull*, Congress' Powers Are Limited to Those Enumerated in the U.S. Constitution

It is still axiomatic in the late Twentieth Century that "[t]he Constitution created a Federal Government of limited powers." *New York v. United States*, 112 S. Ct. 2408, 2417 (1992) (citation omitted). Nevertheless, whether and to what extent Congress has the power to enact retroactive civil laws today does not lend itself to clean constitutional analysis, due to the seminal retroactivity case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).[8]

In *Calder v. Bull*, the Court is generally understood to have held that the Constitution's two express prohibitions against *ex post facto* laws only apply to criminal legislation. Consequently, parties in litigation tend to treat the two distinct *ex post facto* prohibitions, applicable to the States and to Congress respectively, as interchangeable. *See, e.g.*, Brief of the United States at 18 n.9 (citing the federal prohibition, Art. I, § 9, Cl. 3, followed by the general proposition that "The Ex Post Facto Clause [is] applicable solely to criminal laws, *Calder v. Bull*, 3

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[7] U.S. Const. art. I, § 9, cl. 3 (restricting Congress); *cf.* U.S. Const. art. I, § 10 (restricting States).

[8] A fundamental yet unaddressed question in this case is this: Where in the Constitution did the States respectively or the people cede power to Congress to change "the law" affecting a limited number of private parties in Article III litigation? *See United States v. Butler*, 297 U.S. 1, 63 (1936) ("The question is not what power the federal government ought to have, but what powers in fact have been given by the people."), *quoted in New York v. United States*, 112 S. Ct. at 2418. Petitioners and the Solicitor General ignore this fundamental question. Instead, they ask this Court to confer upon Congress, in effect, an unlimited power to change certain laws retroactively, even when that change affects the respective rights of private parties in pending or dismissed cases before Article III courts. *Amicus* believes the American people deserve better -- and are entitled to better under *their* Constitution.

U.S. (3 Dall.) at 3 [construing the state prohibition, Art. I, § 10, Cl. 1]").

A close reading of Justice Iredell's and Justice Peterson's separate concurring opinions in *Calder v. Bull*, however, suggests that the holding of the Court would have been different had the legislative power at issue in that case been federal instead of state, as explained more fully below. This case presents an opportunity for the Court to revisit or distinguish *Calder v. Bull*, and to clarify the constitutional limits on Congress to enact legislation affecting private litigants retroactively.

Calder v. Bull involved state legislation that "set aside a decree of the court of Probate for Hartford . . . and granted a new hearing." 3 U.S. (3 Dall.) at 386 (Chase, J.). As was the custom at the time, the Supreme Court delivered the opinions of the various justices *seriatim*. Justice Chase opined that the *ex post facto* prohibition applicable to the Connecticut legislature (Art. I, § 10) applied only to four types of criminal laws. 3 U.S. (3 Dall.) at 390. Justices Paterson and Iredell, in separate concurring opinions, expounded on the "indefinite nature" of the Connecticut Legislature's powers, which at the time included both legislative *and judicial* functions (in stark contrast to the federal Legislature's powers then and now).

The Court's decision in *Calder v. Bull* is thus not controlling precedent in a case involving the federal legislature, which unlike the legislative power at issue in *Calder v. Bull*, is constrained not only by explicit due process and *ex post facto* restrictions, but also by other organic, structural, and textual constitutional constraints on the exercise of federal legislative power. Likewise, this case is not controlled by *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), in which an intervening treaty between the United States and France affected the disposition of a captured warship that a lower court had condemned as "prize." In *Schooner Peggy*, Chief Justice Marshall himself distinguished "private cases between individuals" (Section 27A cases) from "great national concerns where individual rights acquired by war are sacrificed for national purposes" (*Schooner Peggy*). 5 U.S. (1 Cranch) at 110.[9]

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[9] During oral arguments last April in *Morgan Stanley & Co. v. Pacific Mutual Life Insurance Co.* (No. 93-609), counsel for the United States conceded that the Government's arguments for sustaining Section

(continued...)

Accordingly, this case should be treated as a case of first impression both under the Separation-of-Powers doctrine as applied to private litigants, and under other structural and textual indicia of the intent of the framers and ratifiers of the United States Constitution vis-à-vis retroactive legislation affecting private litigants, including the Rule of Law, the procedural Due Process clause, and the federal *Ex Post Facto* clause.

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[9](...continued)
27A are based on caselaw distinguishable from the Section 27A context:

> Justice Scalia: Mr. Dreeben, does the Government have any case other than Sioux Nation in -- in which Congress has done this -- set aside an extant judgment [between or among private litigants]?
>
> Mr. Dreeben: Well, the other cases that -- that were the ones that Sioux Nation relied on, which are also cases in which the Government was --
>
> Justice Scalia: No case, in -- in which a private party was a party to the judgment, has Congress ever tried to set it aside?
>
> Mr. Dreeben: I am not sure that there is no case. But we rely -- we don't rely --
>
> Justice Scalia: But you don't know of any?
>
> Mr. Dreeben: No. We don't rely on any precedent of this Court that says that.

Official Transcript at 49.

Amicus has searched in vain for any decisions of this Court involving an Article III judgment between or among private parties where Congress has sought to "set aside an extant judgment" -- aside from, of course, *Morgan Stanley*, in which the Court reached a 4-4 vote split on Section 27A's constitutionality (Justice O'Connor taking no part in the decision).

B. The Constitution Restricts the Power of Congress to Enact Retroactive Legislation Like Section 27A

1. Retroactive legislation affecting pending or dismissed cases between or among private litigants violates the Rule of Law underpinnings of the Constitution.

Earlier this Century, the classical liberal scholar Friedrich von Hayek described the Rule of Law, with its inherent restriction on retroactive legislation, as the single most distinguishing factor of a free society: "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. von Hayek, *The Road to Serfdom* 72 (1944).[10]

That a general prohibition against retroactive lawmaking is deeply rooted in Anglo/American jurisprudence cannot be disputed. Blackstone argued that "laws should not be enforced before the subjects have an opportunity to become acquainted with them." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 777 (1936). James Madison justified restrictions on retroactive laws in the United States Constitution on the grounds that such restrictions "will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist* No. 44, at 128-29 (R. Fairfield 2d ed. 1966).

Other contemporaneous legal authorities who influenced the framers and ratifiers of the United States Constitution agreed generally that the type of retroactivity in this case is inherently contrary to the rule of law. For example, Professor Burlamaqui

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[10] *See* S. von Pufendorf, VII *De Jure Naturae et Gentium: Libri Octo* Ch. VI, § 11 (1688) (C.H. & W.A. Oldfather trans. 1934) ("[I]t is clear in what sense is to be taken the statement of the ancient Greek writers on politics and their followers, namely, that the government of a state should be committed to laws rather than to men. For that can have no other fit meaning than this: Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed pleasure." (Citation omitted)).

wrote: "It is necessary that the laws be sufficiently notified to the subject; for how could he regulate his actions and motions by those laws, if he had never any knowledge of them?" J. Burlamaqui, *The Principles of Natural Law* 104 (Nugent trans. 3d ed. 1780); *see* J. Burlamaqui, 2 *The Principles of Natural and Politic Law* 154 (Nugent trans. 3d ed. 1784) ("The establishment of civil society ought to be fixed, so as to make a sure and undoubted provision for the happiness and tranquillity of man. For this purpose it was necessary to establish a constant order, and this could only be done by fixed and determinate laws.").

Amicus respectfully suggests: (1) that these and other historical insights into the inherent injustice of retroactive laws are instructive as to how the framers and ratifiers of the United States Constitution would have viewed Section 27A; and (2) that the inescapable conclusion has to be that Section 27A violates the Rule of Law underpinnings of the Constitution.

2. Section 27A is judicial in nature, and therefore violates the separation-of-powers doctrine.

In *Calder v. Bull*, Justice Iredell suggested that the Connecticut legislature's exercise of *judicial* power in the form of purely retroactive legislation was "strange," implying that the federal Congress, due to separation-of-powers doctrine principles, could not even countenance the idea:

> It may, indeed, appear strange to some of us, that in any form there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her Legislature. . . . The power, however, is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.

3 U.S. (3 Dall.) at 398 (Iredell, J., concurring "in the general result," dissenting in part due to "the reasons that are assigned").

Chancellor Kent of New York, author of *Commentaries on American Law* (9th ed. 1858), while acknowledging the holding

in *Calder v. Bull* in *Dash v. Van Kleeck*, expounded on the judicial nature of retroactive legislation:

> It is equally inadmissible to consider [a legislative] act as declaring how the former statutes were to be *construed*, as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect, as any other newly created statute. But if it be considered as an exposition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognisance of a judicial question. This could not *possibly* have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well settled axiom that the union of these two powers is tyranny. . . . Our government . . . consists of departments, and contains a marked separation of the legislative and judicial powers. . . . [T]he right to interpret laws does, and ought to belong exclusively to the courts of justice.

7 Johns. 477, 508-09 (N.Y. Sup. Ct. 1811) (emphasis in original).

Professor Story later justified the result in *Calder v. Bull* on grounds clearly distinguishable from federal legislation: "There is nothing in the Constitution of the United States which forbids a State legislature from exercising judicial functions; nor from divesting rights vested by law in an individual, provided its effect be not to impair the obligation of a contract." J. Story, 2 *Commentaries on the Constitution of the United States* 272 (5th ed. 1891).

Justice Scalia more recently opined that retroactivity, while appropriate for judicial decisions, is constitutionally problematic for legislation generally: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." *Harper v. Virginia Dep't of Taxation*, 113 S.

Ct. at 2510 (Scalia, J., concurring) (quoting T. Cooley, *Constitutional Limitations* 91 (1868)).[11]

To the extent Section 27A is what its sponsors purport, *i.e.*, a purely retroactive compromise addressing only pending and dismissed cases, Section 27A is judicial in nature and therefore outside the scope of Congress' legislative powers.

3. The Solicitor General's Misconstruction of *Beam* And *Seattle Audubon* Would Create a Conflict Between Those Cases and the Separation-of-Powers Doctrine.

The Solicitor General not only fails to appreciate the serious separation of powers issues discussed above; he has misconstrued this Court's decision in *Robertson v. Seattle Audubon Soc.*, 112 S. Ct. 1407 (1992) ("*Seattle Audubon*"), so as to validate virtually any congressional command which takes a legislative form, but even suggested that the judicial retroactivity principles set forth in *Beam* are subject to suspension (and presumably even eradication) by Congress.[12] Taken together, these misconstructions of recent High Court rulings create a serious conflict with traditional separation of powers jurisprudence.

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[11] *See* Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 Ky. L.J. 323, 327-33 (1993) (discussing historical bases for *ex post facto* restrictions vis-à-vis separation of powers); *see generally* Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 Tex. L. Rev. 875, 878 (1982) ("the due process clauses look to legislatures only for substantive entitlements, and . . . the clauses commit minimum procedural rights to the Constitution and therefore to the Court"), *citing* Michelman, *Formal and Associational Aims in Procedural Due Process*, in Nomos XVIII: Due Process 126, 133-34, 158-59 n.27 (J.R. Pennock and J. Chapman eds. 1977).

[12] On page 13 of the Brief for the United States, the Solicitor General cites *Seattle Audubon* for the proposition that "Congress exercised its 'legislative powers' by passing a law, in response to *Lampf*, that prescribed a new rule of decision to be applied by the courts." At page 20 (in footnote 12), the Solicitor General suggests that the Court in *Seattle Audubon* held "that when Congress 'amend[s] applicable law,' its action does not implicate the principles underlying *Klein*."

Some lower courts mistakenly have found that *Seattle Audubon* controls this case, even though the Court in *Seattle Audubon* merely applied the proposition (inapposite here) that once Congress makes a change in the underlying law following a lower court decision, appellate courts may apply the altered law to pending cases. 112 S. Ct. at 1407; *cf. Schooner Peggy*, 5 U.S. (1 Cranch) at 103 (an intervening treaty affected the disposition of a captured warship that a lower court had condemned as "prize"). The Court resolved *Seattle Audubon* by holding that Congress indeed had made substantive prospective changes in the underlying statute, *see* 112 S. Ct. at 1413 ("subsection (b)(6)(A) compelled changes in law, not findings or results under old law"), 1414 (provision in question affected pending case "by effectively modifying the provisions at issue in those cases"), which changes properly were applied to pending cases.

It does not follow, however, that when Congress makes absolutely no prospective change in the provisions of the underlying statute -- as is true with Section 27A -- it remains free to enact a purely retroactive statute requiring that the courts ignore an otherwise determinative Supreme Court interpretation of that statute. Under the reasoning in *Seattle Audubon*, the substantive law which should be applied to this case, and to all implied private actions under the 1934 Act, is exactly the same; there is no "new law" to be applied to any 1934 Act case, as none of the underlying statutory provisions in the 1934 Act have been changed. Congress has no authority to legislate retroactive exceptions to the application of the laws of the United States, even if it has the power to alter those laws prospectively.[13]

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[13] This follows as well from the basic proposition that this Court is the final arbiter of the intent of a previous Congress, and its decisions resolve, once and for all, the meaning of a statute at the time of its decision. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *see also United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) ("[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history").

Congress has no authority to insist that an erroneous construction of prior law (in this case, circuit law disavowed in *Lampf* as inconsistent with the intent of the 73rd Congress, *see Musick*, 113 S. Ct. at 2089-90) be applied to pending cases, much less to revivify

(continued...)

The lower courts that have sustained Section 27A have eschewed this common sense reading of *Seattle Audubon* in favor of construing that case to validate "an act of Congress that is intended to affect litigation *so long as it changes the underlying substantive law in any detectable way.*"[14] If this approach is correct, then *Seattle Audubon* -- a decision which did not purport to resolve separation of powers issues, 112 S. Ct. at 1414 -- has tacitly overruled all of this Court's separation of powers jurisprudence and has rendered *United States v. Klein* a dead letter. Yet *Seattle Audubon* does not overrule *Klein*, either explicitly or implicitly. The Court in *Seattle Audubon* never intimated or held that Congress could enter directly into the judicial sphere at all, much less by dictating that the courts resolve any case on the basis of counterfactual assumptions.

The only construction of *Seattle Audubon* faithful to traditional separation of powers jurisprudence is that Congress does not make a change in the underlying substantive law simply because it couches a command in statutory guise, regardless of whether that rule of law requires reversal of a judgment of this Court or an invasion of core judicial functions. The lower courts' form over substance reading of *Seattle Audubon* is unfaithful to separation of powers doctrine, which clearly condemns legislative attempts to act as a "super-Supreme Court" and exercise judicial functions in legislative guise.[15]

The lower courts similarly have misconstrued *Beam* in almost conscious disregard of separation of powers principles. For example, several appellate courts have reasoned that *Beam*

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[13](...continued)
cases that already have been dismissed, or that may have been settled, on the basis of this Court's definitive construction of the law. *See also Beam*, 501 U.S. at 542 (Souter, J., joined by Stevens, J.) (quoting *Federated Department Stores v. Moitie*, 452 U.S. 394, 410 (1981)) (addressing finality concern raised by relitigation of issues).

[14] *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993) (emphasis added).

[15] *See Hurtado*, 110 U.S. at 535-36 ("It is not every act, legislative in form, that is law. . . . It must be not a special rule for . . . a particular case. . . thus excluding, as not due process of law, . . . acts reversing judgments . . . legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the form of legislation.").

is not constitutionally based and therefore is subject to suspension by the legislature.[16] This analysis ignores the underlying separation of powers issue, which is whether *Beam's* judicial retroactivity principles are matters within the exclusive purview of the judiciary. The several opinions in *Beam* reflect "that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally,"[17] inherent in "basic norms of constitutional adjudication,"[18] mandated by "the Constitution."[19] *Beam's* rejection of selective prospectivity derives "from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court." 501 U.S. at 547 (Blackmun, J., joined by Marshall, J. and Scalia, J.); *see Harper*, 113 S. Ct. at 2517.

Beam establishes that, in our constitutional scheme, the judiciary has the exclusive responsibility for deciding under what circumstances judicial decisions shall be applied to litigants already in the judicial system. This power cannot constitutionally be exercised by Congress, regardless of whether any particular judicial rule for making these decisions is "constitutionally based." *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (essential

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[16] *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533, 1547 (10th Cir. 1002); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1458 n.3 (7th Cir. 1992); *First Winthrop Corp.*, 989 F.2d at 1572. *Contra Harper*, 113 S. Ct. at 2517 ("Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, [*Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)], we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases.").

[17] *Beam*, 501 U.S. at 537 (Souter, J., joined by Stevens, J.).

[18] *Beam*, 501 U.S. at 547 (Blackmun, J., joined by Marshall, J. and Scalia, J.).

[19] *Beam*, 501 U.S. at 548 (Scalia, J., joined by Marshall, J. and Blackmun, J.).

attributes of Article III powers must remain in the courts).[20] Even temporary legislative suspension of these judicial rules invades Article III and exceeds the authority of Congress under Article I.

If the lower courts are correct, then Congress can overturn rather than suspend *Beam*, ordering the courts -- including this Court -- to continue to utilize the *Chevron* test (or any other test devised by Congress) in order to determine whether to apply existing precedent to litigants within the judicial system. *But see Harper*, 113 S. Ct. at 2512 n.9 (rejecting *Chevron Oil* analysis as an inappropriate method for determining choice of law to be applied in the federal courts). Determining whether to apply one rule of law or another to parties in litigation is an essential attribute of deciding Article III "cases" and "controversies." Regardless of whether *Beam* is based on the Constitution *per se*, it thus resolves a question within the exclusive authority of the judiciary, which constitutionally is not subject to revision by the Congress.

Absent prompt clarification by the Court, lower court misconstruction of these important recent rulings will continue and the separation of powers doctrine as enunciated by the Court throughout its history will cease to exist.[21]

4. Federal legislative power does not extend between Congresses.

Article 1, Section 1 vests all "legislative powers . . . in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Every two years a new Congress is formed, and this Court has observed that the views

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[20] For example, the Constitution surely does not require that the courts read briefs submitted by litigants. Yet even so, Congress surely cannot pass a law forbidding the courts from reading briefs at all, or from reading briefs submitted by certain litigants (*e.g.*, those whose names begin in the latter half of the alphabet) or in a certain class of cases (*e.g.*, defendants in civil rights cases). These are matters within the scope of Article III authority, as are the judicial retroactivity rules established by *Beam*.

[21] *Cf. Harper*, 113 S. Ct. at 2523 (Scalia, J., concurring) ("The critics of the traditional rule of full retroactivity were well aware that it was grounded in what one of them contemptuously called 'another fiction known as the Separation of Powers.'" (citation omitted)).

Congress is formed, and this Court has observed that the views of one Congress about the intent of a prior enacting Congress are entitled to little deference. *See Vogel Fertilizer*, 455 U.S. at 34; *Teamsters*, 431 U.S. at 354 n. 39; *see also McMann*, 434 U.S. at 200 n.7.

In 1934 the 73rd Congress enacted section 10(b) of the Securities and Exchange Act. Almost 60 years later, the 101st Congress enacted Section 27A, which purported to clarify "the law" prior to *Lampf* and *Beam*. But one Congress cannot definitely speak for the intent of another, for such would be an usurpation of judicial power. *Cf. Beam*, 501 U.S. at 549 (Scalia, J., joined by Marshall and Blackmun, JJ.) (discussing judicial retroactivity vis-à-vis the division of federal powers).

The limitation in Article I, Section 1 of "all legislative power" to "a Congress" suggests that the legislative power does not extend between Congresses. Accordingly, once a Congress has adjourned, that Congress' intent cannot be reconsidered by a subsequent Congress, especially as to cases and controversies wherein individuals have relied upon a law enacted by the prior Congress. As Chief Justice Marshall admonished in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), "if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." 10 U.S. (6 Cranch) at 135 (discussing contract clause restrictions on state governments).

Because the case against Spendthrift Farms, et al. was dismissed under the Securities and Exchange Act of 1934, as enacted by the 73rd Congress, Section 27A enacted by the 101st Congress "cannot undo it." 10 U.S. (6 Cranch) at 135.

II. TEXTUAL INDICIA SHOULD BE CONSTRUED BROADLY FOR A GOVERNMENT OF LIMITED POWERS

To the extent a power to enact retroactive legislation turns on presumptions (such as the presumption that the founders intended the term "*ex post facto*" to apply only to criminal statutes), any such presumptions should take into consideration the fundamentally different natures of state versus federal

governmental powers in the United States.[22] As the Court clarified in *Butler*:

> Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

297 U.S. at 63.

The power of Congress to change laws affecting private parties in litigation is neither enumerated nor "reasonably to be implied from those granted." 297 U.S. at 63. Neither the petitioner nor the Solicitor General has suggested an enumerated power of Congress upon which the power to enact Section 27A was based -- because there is none.[23] Likewise, neither

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[22] *See* T. Cooley, *Constitutional Limitations* 173 (1868) ("The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. . . . Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited."). Accordingly, a state government may be presumed to have a power to enact retroactive civil laws while the federal government is presumed not to have such power.

[23] Petitioner's conclusory statement that "Congress enacted Section 27A(b) in a valid exercise of the enumerated power to regulate interstate commerce" (Petitioner's Brief at 26) is just that -- conclusory. Likewise, the Solicitor General only insinuates that Section 27A was (or could have been) enacted "pursuant to its power (continued...)

petitioner nor the Solicitor General has suggested that the power to reopen dismissed Article III "cases or controversies" between or among private parties is "reasonably implied from those granted" -- because it's not.

A. Section 27A Violates Procedural Due Process.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The "guaranty of due process" protects individuals from "unreasonable, arbitrary or capricious" governmental regulation of commercial matters. *Nebbia v. New York*, 291 U.S. 502, 525 (1934). Purely retroactive legislation affecting private parties in pending or dismissed litigation is antithetical to the rule of law and therefore should be *per se* "unreasonable, arbitrary or capricious" as a matter of procedural due process. As Justice Powell emphasized in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" 424 U.S. at 348 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). Retroactive legislation like Section 27A provides neither notice nor an opportunity "to meet it."

The procedural nature of constraints on retroactive lawmaking, whether criminal or civil, is made clear by Blackstone's 1765 exposition on "The Nature of Laws in General," wherein he discusses the several properties of "municipal or civil law," as distinguished from "the law of nature, the revealed law, and the law of nations":

> [Municipal or civil law] is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which

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[23](...continued)
to establish inferior federal courts (Art. I, § 8, Cl. 9) and the Necessary and Proper Clause (Art. I, § 8, Cl. 18)." Brief of the United States at 24.

this notification is to be made, is matter of very great indifference. . . . Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectively to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*."

W. Blackstone, 1 *Commentaries on the Laws of England* 45-46 (1765) (emphasis in original).[24]

Because this case presents a *procedural* conflict between private rights and expectations on the one hand and the federal government's desire to penalize certain defendants on the other, it fits squarely within the "principal function of the Due Process Clause." *McGautha v. California*, 402 U.S. 183, 254 (1971) (Brennan, J., dissenting, joined by Douglas and Marshall, JJ.) ("The principal function of the Due Process Clause is to ensure that state power is exercised only pursuant to procedures

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[24] *See Dash v. Van Kleeck*, 7 Johns. at 495 (Thompson, J.) ("After referring to the unjust and iniquitous practice of the *Roman* emperor, (*Caligula*), as to the manner of writing and publishing his laws, [Blackstone] observes, that there is still a *more unreasonable* method than this, which is called making laws *ex post facto*. Although, technically speaking, the term *ex post facto* may be applicable only to laws punishing criminal offenses, the principle is equally applicable to civil cases." (Emphasis in original)); *see generally Reno v. Flores*, 113 S. Ct. 1439, 1455 (1993) (O'Connor, J., concurring) ("procedural due process protections" include "notice of charges").

adequate to vindicate individual rights."), *vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972).[25] If ever there was a fundamental civil right, albeit procedural, that is both "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.), and "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it is the right to be free from retroactive governmental deprivations of a recognized right, such as the retroactive revival of a cause of action that has been judicially dismissed, whether or not an appeal can still be, or has been, filed.

B. Section 27A Violates the Federal *Ex Post Facto* Clause.

Article I, section 9 of the U.S. Constitution, concerning restraints on Congress, states that "[n]o Bill of Attainder or *ex post facto* Law shall be passed." In a similar manner, article I, section 10 states that "[n]o State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts." Practically all of this Court's caselaw examining and construing the term "*ex post facto*" involves the latter clause (regarding States), and not the former (regarding Congress). *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (Rehnquist, C.J., reviewing the litany of cases since *Calder v. Bull* that have restricted the term "to penal statutes which disadvantage the offender affected by them"). The Court's few cases involving the federal *ex post facto* prohibition typically cite *Calder v. Bull* (construing the state *ex post facto* prohibition) or other authorities stemming therefrom.[26]

The Court apparently has never before been faced with a federal *ex post facto* case that hearkened back to the distinguishing factors expounded by Justices Iredell and Paterson

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[25] *Cf. United States v. Carlton*, 114 S. Ct. at 2027 ("the Due Process Clause guarantees *no* substantive rights, but only (as it says) process") (Scalia, J., concurring in the judgment).

[26] *See, e.g., Kaiser Aluminum & Chemical Co. v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (Jackson, J.), *reh'g denied*, 343 U.S. 936 (1952); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (Taft, C.J.); *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (Pitney, J.).

in *Calder v. Bull*, discussed more fully *infra*. The Court's caselaw, however, has never fully closed the door on the obvious distinctions between federal and state *ex post facto* restrictions. For instance, Chief Justice Rehnquist's opinion in *Collins* suggests, at least implicitly, that the restrictive interpretation stemming from *Calder v. Bull* is limited to the state *ex post facto* clause. *See* 497 U.S. at 41 n.2 ("the Court has consistently adhered to the view expressed by Justices Chase, Paterson, and Iredell in *Calder* that the *Ex Post Facto* Clause [singular] applies only to penal statutes.").

In any case, while the contexts of the respective *ex post facto* prohibitions are quite distinguishable (see discussion of structural indicia, *infra*), they both evince a firm belief that legislative retroactivity -- which results in the unsettling of established rights and/or expectations -- is inherently pernicious. Confirming this belief, James Madison wrote that "*ex-post-facto* laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist* No. 44 at 128. The Congressional Research Service recognizes the historical legitimacy of arguments that the *ex post facto* clauses should apply to all legislation: "At the time the Constitution was adopted, many persons understood the terms *ex post facto* laws to 'embrace all retrospective laws, or laws governing or controlling past transactions, whether . . . of a civil or a criminal nature.'" Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 16, 99th Cong., 1st. Sess. 381-82 (1987) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* § 1339 (Boston: 1833)).

Supporting the then-popular sentiment that retroactive criminal and civil laws were seen in the same light, the New Hampshire Constitution of 1784 warns that "[r]etroactive laws are highly injurious, oppressive, and unjust. No such law, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. Const. of 1784, Part 1, § 23.

It is clear from the writings of Thomas Jefferson that the framers' abhorrence of *ex post facto* laws applied to all federal laws, whether civil or criminal. In 1813, for example (even after *Calder v. Bull*), Jefferson wrote of the retroactive application of a congressional patent law:

> Every man should be protected in his lawful acts, and be certain that no *ex post facto* law shall punish or endamage him for them. . . . The sentiment that *ex post facto* laws are against natural right, is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. . . . [T]hey are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing of what is wrong.

T. Jefferson, Letter to Isaac McPherson, Aug. 13, 1813, in 8 *The Writings of Thomas Jefferson* 326-27 (A. Bergh ed. 1903).

Likewise, Chancellor Kent of New York, while acknowledging the holding in *Calder v. Bull*, wrote that "there is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right soon ceases to regard the other." *Dash v. Van Kleeck*, 7 Johns. at 506; *and see* 7 Johns. at 503-04 (referring to intentionally retroactive laws as "pernicious" and "repugnant to common justice").

Notwithstanding *Calder v. Bull* and its legal progeny, a number of prominent jurists and scholars in this Century have insisted that the *ex post facto* clauses should apply in the civil context. *See, e.g., Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 690 (Black and Douglas, JJ., concurring in the result), *reh'g denied*, 354 U.S. 944 (1957); *Marcello v. Bonds*, 349 U.S. 302, 319 (Douglas, J., dissenting), *reh'g denied*, 350 U.S. 856 (1955); *see generally* Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 Chi. L. Rev. 539 (1947) (citing original historical sources); P. Kurland & R. Lerner, 3 The Founder's Constitution 343-54 (eds. 1987) (quoting, *inter alia*, Justice Johnson's Note to *Satterlee v. Mathewson*, 2 Pet. 380 (1829)).

In a few cases since *Calder v. Bull*, the Court has even suggested that certain new civil laws, if applied retroactively, could be *per se* unconstitutional. For example, in *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96 (1906), this Court affirmed the Arizona Supreme Court's analysis that "if construed as absolutely barring causes of action existing at the time of its passage [a new statute of limitation] was unconstitutional." 200 U.S. at 102 (agreeing with Arizona

Supreme Court, citing *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873)). In 1927 this Court struck down a retroactive application of a federal estate tax as unconstitutional. *Nichols v. Coolidge*, 274 U.S. 531 (1927). Other cases have held that retroactively-imposed laws can be "confiscation of property in violation of due process of law." Smead, *supra*, 20 Minn. L. Rev. at 796 (reviewing other cases; citations omitted).

Amicus believes that retroactive legislation affecting pending litigation between or among private litigants, especially as applied to completed transactions — as this and other Section 10(b) cases are — is inherently unreasonable. More importantly, the due process and *ex post facto* clauses, together with contemporaneous historical indicia, demonstrate that the framers and ratifiers of the United States Constitution shared this belief.

III. SECTION 27A CAN AND SHOULD BE READ AS A CODIFICATION — NOT A "REVERSAL" — OF THE COURT'S HOLDINGS IN *LAMPF* AND *BEAM*

In considering Section 27A in the context of cases pending when the Court decided *Lampf* and *Beam*, regardless of whether a case "was dismissed as time barred subsequent to June 19, 1991" (Section 27A(b)), the proper focus is the statutory provision declaring that the applicable statute of limitations shall be "the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."[27] A fundamental question of construction in any Section 27A case, therefore, is whether the "*law* applicable in the jurisdiction" should be read to mean (1) pre-*Lampf* judicial interpretations *and misinterpretations* of the 1934 Act's statute of limitations, *or* (2) the Securities Exchange Act of 1934 and laws involved in *Beam*, as first articulated by several lower federal courts and dispositively construed by the Supreme Court in *Lampf* and *Beam*.[28] The

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[27] Both Section 27A(a) and Section 27A(b) contain this identical language.

[28] Even before *Lampf*, several lower federal courts had recognized that a "1 and 3 year" statute of limitations should be applied uniformly to claims premised on Section 10(b). *See, e.g., In re Data Access*

(continued...)

answer to this question is dictated by several recognized rules of statutory construction, and several fundamental truisms regarding the nature of the federal judicial system.

Amicus suggests that, in construing Section 27A, the Court inevitably must take one of the following awkward positions vis-à-vis petitioner's argument that Section 27A can be read literally to avoid constitutional issues: (1) that Section 27A's language should be read non-literally (but consistent with legislative history), thereby forcing the Court to address serious constitutional issues relating to the effect of such a non-literal reading on both litigants and the judiciary itself; or (2) that Section 27A's language should be read literally (but inconsistent with legislative history), thereby avoiding the constitutional issues but at the same time reading the text of Section 27A as at odds with the available non-textual evidence of legislative "intent."[29] If the Court does not address this issue, it implicitly takes the first position, thereby acquiescing to the fallacy that *Lampf* made statutory "law." *Amicus* urges the Court at least to address respondents' literal construction argument squarely.

A. Text, Not Legislative History, Controls the Meaning of Section 27A

Section 27A, when subjected to recognized rules of statutory construction, does not require courts to address the complex constitutional issues relating to retroactivity, separation-of-powers doctrine, etc. Many of the reported Section 27A cases fail to recognize this point because they adopt the view that Congress "intended" Section 27A to "undo" or "reverse" the Court's holdings in *Lampf* and *Beam* -- a view based primarily upon floor statements inserted into the record

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[28] (...continued)
Systems Sec. Litigation, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988); *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990), cert. denied, 501 U.S. 1250 (1991).

[29] *See Plaut v. Spendthrift Farm*, 1 F.3d at 1500 ("Courts are under a duty to impose a saving interpretation of an otherwise unconstitutional statute so long as it is 'fairly possible to interpret the statute in a manner that renders it constitutionally valid.'", *quoting Robertson v. Seattle Audubon*) (Kieth, J., concurring in part and dissenting in part).

by several legislators.[30] The United States has presumptively adopted this position in the numerous intervenor briefs it has filed.

Notwithstanding petitioners' and the Government's assumption that floor statements control the meaning of Section 27A, in other contexts substantial questions have been raised regarding the utility of such statements in divining legislative "intent." As one United States Senator recently explained:

> It is very common for Members of the Senate to try to affect the way in which a court will interpret a statute by putting things into the Congressional Record. . . . [W]hatever is said on the floor of the Senate about a bill is the view of a Senator who is saying it . . . . [A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.

137 Cong. Rec. S15,325 (daily ed. Oct. 29, 1991) (statement of Sen. Danforth); *see Hirschey v. FERC*, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J. concurring).

Although legislative history may appear to offer "clear" evidence of Congressional intent, it is recognized that the resultant statutory text may "simply fail[] to give effect to that intention." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 790 (1981) (Stevens, J. concurring). Similarly, the fact that a federal statute may have unintended effects "is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may, if it sees fit, amend the law." *Caminetti v. United States*, 242 U.S. 470, 490-1 (1917).

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[30] *See, e.g., Maio v. Advanced Filtration Sys., Ltd.*, 795 F. Supp. 1364 (E.D. Pa. 1992) (quoting floor statement of Rep. Markey, "a principal champion of § 27A"), *appeal denied*, 993 F.2d 878 (3d Cir. 1993).

B. The Text of Section 27A Does Not Require Blind Acquiescence to the Fallacy that *Lampf* Made Statutory "Law"

The lower federal courts, and the numerous United States intervenor briefs by implication, have presumed that in Section 27A Congress meant "the laws" to mean the then-existing interpretations *or misinterpretations* of the Securities Exchange Act of 1934 within the various federal judicial circuits. This presumption is *not* required by statutory language, nor is it mandated by the rule of construction that "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity," *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892), as both literal and non-literal readings of 27A lead to arguably absurd results -- hence the dilemma: on the one hand, a literal reading would likely frustrate certain legislative and administrative sponsors of Section 27A; on the other hand, the currently unchallenged presumption, implicitly adopted by lower courts and the Department of Justice, contorts the role of the Judiciary under Article III.

Under the principles recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) at 137, "[i]t is emphatically the province and duty of the judicial department to say what the law is," while it is the role of Congress to make federal laws.[31] Thus, as one district court considering Section 27A has noted:

> As explained in *Beam*, the *Lampf* Court was not making law, but rather, was "'finding it' — discerning what the law is, rather than decreeing today what it is today *changed to*, or what it will *tomorrow* be." *Beam*, [501 U.S. at 549] (Scalia, J., concurring) (emphasis in original). The limitations period "found" in *Lampf* thus did not represent a change in the law, but rather, a mere clarification what the law has always been. Courts such as the Fifth Circuit, which had previously applied other limitations periods to section 10(b) claims, had thus done so in error.

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[31] In contrast with state courts of general jurisdiction which might be said to "make" common law, federal courts are empowered only to interpret and apply the Constitution, treaties and laws of the federal government and are constrained to apply state rules of decision in diversity cases.

TGX Corp. v. Simmons, 786 F. Supp. 587, 592 (E.D. La. 1992). In fact, there was nothing "new" about the Supreme Court's construction of the Securities Exchange Act in *Lampf*, because some lower courts had reached the same result. *See, e.g., Data Access*, 843 F.2d at 1537; *Short*, 908 F.2d at 1385. The "laws," as that word is used in Section 27A, should be construed as a term of art with a specific meaning in the context of the tripartite federal system. When Section 27A is read with such broader structural principles in mind, the statute merely codifies the Court's holdings in *Lampf* and *Beam*.

In Section 27A, Congress explicitly referred to "the laws" as regarding "[t]he limitation period for any private civil action implied under Section 10(b)." There can be but one Congressional intent behind the Securities Exchange Act of 1934 with respect to "[t]he limitation period," and *Lampf* has definitively interpreted that intent. *Lampf*, 501 U.S. at 359 ("In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed. Fortunately, however, the drafters of § 10(b) have provided guidance.").

Congress could have used the words "various judicial interpretations of the laws" instead of "the laws" in Section 27A, but it did not. The plain language Congress chose in Section 27A thus leads to only one constitutionally acceptable conclusion: Congress intended "the laws" to mean *its* laws; and the Supreme Court has held that these laws have *always* required a uniform federal statute of limitation, regardless of any prior misinterpretation by federal district and circuit courts.[32]

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[32] The decisions of those lower courts that have ignored the literal construction issue, such as the Eleventh Circuit panel majority's opinion in *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S.Ct. 95 (1993), betray a fundamental misunderstanding of bedrock constitutional principles concerning the relative roles of the legislature and the judiciary. The Eleventh Circuit majority opinion in *Henderson*, for example, states that "it must be presumed that Congress was aware of the law as it existed in all the circuits"; yet "the law" embodied in federal statutes (such as statutes of limitation) is by nature national and uniform, not something created in each federal judicial circuit.

C. Rules of Statutory Construction Dictate a Literal Reading of Section 27A to Avoid Unnecessary Constitutional Issues

Two canons of statutory construction militate against reading the statutory reference to the applicable "laws" as referring to the varying interpretations and misinterpretations given the 1934 Act in the lower federal courts.

First, if Section 27A's reference to the applicable "laws" means the varying interpretations and misinterpretations given the 1934 Act in the lower federal courts, Section 27A in effect established diverse limitations periods which applied retroactively, but not prospectively. As the Supreme Court has noted, however:

> Retroactivity is not favored in the law. Thus, Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); *see Kaiser Aluminum & Chemical Corp.*, 494 U.S. at 842 (citing and discussing longstanding Supreme Court authority for "the clear rule of construction" that "legislation is to be applied only prospectively unless Congress specifies otherwise"); *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994) ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

Second, to the extent Section 27A is viewed as retroactive and designed to "reverse" *Lampf* and *Beam*, this interpretation of Section 27A gives rise to serious constitutional separation-of-powers doctrine issues, discussed *supra* and more extensively by petitioner. Such an interpretation should not be favored because, if possible, statutes are to be construed to avoid possible conflict with the Constitution. *See Morrison v. Olson*,487 U.S. 654, 682 (1988); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *cf.* Comment, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions*, 53 Colum. L. Rev. 633 (1953).

In deference to these rules of statutory construction, Section 27A's reference to the "laws applicable in the jurisdiction . . . on June 19, 1991" can and should be understood to mean the "laws" as expounded by the Supreme Court in *Lampf* and *Beam*.

When so read, Section 27A stands as a codification, rather than an abrogation, of *Lampf* and *Beam*.

CONCLUSION

Amicus urges the Court either to affirm the Sixth Circuit's separation-of-powers doctrine holding, and in so doing to provide a "bright line" constitutional test, or to hold, based on a literal interpretation of the language in Section 27A, that Section 27A is merely a codification of *Lampf* and *Beam*.

Respectfully submitted,

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